

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

THE CITY OF HUNTINGTON,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*

Defendants.

Civil Action No. 3:17-01362

CABELL COUNTY COMMISSION,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*

Defendants.

Civil Action No. 3:17-01665

**DEFENDANTS' RESPONSE TO MAGISTRATE JUDGE ABOULHOSN'S
RECOMMENDATION FOR APPOINTMENT OF A SPECIAL MASTER**

On February 7, 2020, Magistrate Judge Aboulhosn issued a Notice, Dkt. 270, in which he recommended the appointment of a special master to preside over discovery proceedings in this case. The Magistrate Judge further recommended that David R. Cohen, Esquire, who currently serves as a special master in the *National Prescription Opiate Litigation*, 17 MDL 2804 (N.D. Ohio), be appointed as the special master in this case. The Notice also directed the parties to address whether they consent to Magistrate Judge Aboulhosn hearing all appeals from any rulings made by the special master.

For the reasons set forth below, Defendants agree that a special master should be appointed, and suggest that the Court appoint a special master from West Virginia. In this regard, defendants respectfully suggest the appointment of one of two Senior Status West Virginia Circuit Judges -- either the Hon. Christopher C. Wilkes or the Hon. James J. Rowe, or another West Virginia practitioner with experience as a discovery master. Finally, defendants do not consent to Magistrate Judge Aboulhosn exercising jurisdiction over appeals from any rulings of the special master.

I. THE COURT SHOULD APPOINT A SPECIAL MASTER WITH KNOWLEDGE OF WEST VIRGINIA LAW

A. DEFENDANTS CONSENT TO THE APPOINTMENT OF A SPECIAL MASTER

Defendants agree with Magistrate Judge Aboulhosn that the appointment of a Special Master would be beneficial to the conduct of this action. Defendants, therefore, consent to the appointment of a Special Master.

B. THE SPECIAL MASTER SHOULD BE FAMILIAR WITH WEST VIRGINIA ISSUES, PRACTICE, AND PROCEDURES

The overwhelming bulk of the discovery to be conducted in this case focuses on conduct that took place in West Virginia. Defendants have taken no discovery of the two Plaintiffs—a West Virginia city and county, respectively—or any relevant third parties including numerous non-parties at fault who reside in West Virginia and West Virginia state agencies from which Defendants will need extensive discovery. Plaintiffs’ discovery efforts will be similarly West Virginia focused. As plaintiffs acknowledged in their Position Statement, “extensive discovery has taken place with regards to” defendants in the MDL. Dkt. No. 53 at 7. That includes discovery of defendants’ policies and practices at the corporate level. What remains with respect to

defendants, as plaintiffs acknowledge, is “discovery specific to activities and defendants’ actions directed to Cabell County/City of Huntington.” *Id.*

The jurists whom defendants propose to serve as special master are well-qualified to handle West Virginia-specific issues. Senior Status Judge Wilkes was formally the Chief Judge of the Twenty-Third Judicial Circuit (Morgan, Jefferson and Berkeley Counties) having been first elected in 1992. He was an original appointee to the Business Court Division and continues to serve on the panel. Judge Wilkes has served both as a Presiding Judge and Resolution Judge in Business Court matters and was previously Chair of the Division. Senior Status Judge Rowe was formally Chief Judge of the Eleventh Judicial Circuit (Greenbrier and Pocahontas Counties), having been appointed by Governor Caperton in 1997. He was instrumental in establishing the Business Court Division in 2012 and has served on the panel. He assumed Senior Status in 2016. Defendants respectfully submit that that the Court should appoint either Senior Judge Wilkes or Senior Judge Rowe as Special Master in these consolidated cases.

C. MR. COHEN’S OTHER COMMITMENTS AND PRIOR INVOLVEMENT WITH SETTLEMENT AND DISCOVERY DISPUTES

Defendants wish to call the Court’s attention to three impediments to Mr. Cohen’s serving as Special Master in these consolidated cases. *First*, Mr. Cohen is currently serving as the Special Master for ongoing proceedings in the MDL. His responsibilities include the “Track 1B” case that certain parties (not including any of the parties to the cases before this Court) are preparing for a trial in November 2020. The Special Master Role in Track 1B is likely to be extremely labor-intensive. The Court should refer this case to a Special Master who can devote appropriate time to it without the distraction of other opioid matters.

Second, Mr. Cohen has been, and still is, involved in global settlement discussions between the Distributors and various opioid plaintiffs. During those discussions—many of which have

been *ex parte*—the parties have shared confidential information and settlement positions. It would be inappropriate to have Mr. Cohen preside over discovery disputes after acquiring such information. Settlement discussions have always been treated as separate from litigation; the Court should not deviate from that traditional practice.

Third, in his capacity as a discovery master, as in his capacity as a settlement master, Mr. Cohen was authorized by the Court to engage in *ex parte* communications with the parties. See MDL Dkt. No. 69 at 3. (“Appointment Order”). Under the structure established by the Court, Mr. Cohen engaged in *ex parte* communications with counsel on both sides on substantive issues that were in dispute during both the discovery and pretrial phases of Track One. With litigation just beginning in this Court, defendants submit that *ex parte* communications should not be permitted and respectfully object to appointment of a Special Master who has participated in *ex parte* communications in the MDL.

II. APPEALS FROM RULINGS OF THE SPECIAL MASTER

Defendants do not consent to Magistrate Judge Aboulhosn exercising jurisdiction over appeals from rulings of the special master. Without in any way doubting the Magistrate Judge’s ability to perform this function, defendants respectfully submit that it will be more efficient for appeals to be decided by the Court. This is particularly so in a case where both plaintiffs and the Court seek an early trial date, and reviewing the decisions of the special master will enhance the Court’s ability to assess whether the trial date that is set remains feasible in the light of the progress of discovery.

CONCLUSION

The Defendants respectfully request the appointing of a retired West Virginia Circuit Judge, as special master for discovery in this case.

Dated: February 14, 2020

Respectfully Submitted,

McKesson Corporation

By Counsel:

/s/ Jeffrey M. Wakefield

Jeffrey M. Wakefield (WVSB #3894)

jwakefield@flahertylegal.com

Jason L. Holliday (WVSB #12749)

jholliday@flahertylegal.com

FLAHERTY SENSABAUGH BONASSO PLLC

P.O. Box. 3843

Charleston, WV 25338-3843

Telephone: (304) 345-0200

/s/ Mark H. Lynch

Mark H. Lynch

Christian J. Pistilli

Laura Flahive Wu

COVINGTON & BURLING LLP

One CityCenter

850 Tenth Street NW

Washington, DC 20001

Tel: (202) 662-5281

mlynch@cov.com

cpistilli@cov.com

lflahivewu@cov.com

AmerisourceBergen Drug Corporation

By Counsel:

/s/ Gretchen M. Callas

Gretchen M. Callas (WVSB #7136)

JACKSON KELLY PLLC

Post Office Box 553
Charleston, West Virginia 25322
Tel: (304) 340-1000
Fax: (304) 340-1050
gcallas@jacksonkelly.com

/s/ Robert A. Nicholas

Robert A. Nicholas
Shannon E. McClure
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
rnicholas@reedsmith.com
smcclure@reedsmith.com

Cardinal Health, Inc.

By Counsel:

/s/ Steven R. Ruby

Brian A. Glasser (WVSB #6597)
Steven R. Ruby (WVSB #10752)
Raymond S. Franks II (WVSB #6523)
BAILEY GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
Counsel in Cabell County action

/s/ Enu Mainigi

Enu Mainigi
F. Lane Heard III
Ashley W. Hardin
WILLIAMS & CONNOLLY LLP
725 Twelfth Street NW
Washington, DC 20005
Tel: (202) 434-5000
Fax: (202) 434-5029
emainigi@wc.com
lheard @wc.com
ahardin@wc.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 14 day of February, 2020 the foregoing **“Response to Magistrate Judge Aboulhosn Recommendation For Appointment Of A Special Master”** was served using the Court’s CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark H. Lynch
Mark H. Lynch